Nos. 663 and 664 Misc.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1967

BOROUGH OF MOOSIC, PETITIONER,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

CITY OF SCRANTON AND MILTON J. SHAPP, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND ON MOTIONS FOR LEAVE TO INCLUDE RECORD IN NO. 432, CITY OF POTTSVILLE v. UNITED STATES

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI

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ON PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND ON MOTIONS FOR LEAVE TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE v. UNITED STATES

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI

Invoking the powers of this Court under the All Writs Act, 28 U.S.C. 1651(a), the Borough of Moosic, the City of Scranton and Milton J. Shapp, seek

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review of the action of the United States District Court for the Middle District of Pennsylvania in staying until October 1, 1967, all proceedings in *Borough of Moosic* v. *United States, et al.*, Civil Action No. 10054.[1] The original plaintiff in the district court, petitioner Borough of Moosic, located in Lackawanna County, Pennsylvania, brought the action on June 26, 1967,[2] to annul and set aside the orders of the Interstate Commerce Commission (a) authorizing the merger of the Pennsylvania Railroad and the New York Central Railroad Company[3] and (b) requiring the inclusion of the Erie-Lackawanna Railroad Company, the Delaware and Hudson Railroad Company and the Boston and Maine Corporation in the Norfolk and Western Railway system.[4] The two orders of the Commission relate to the remand by this Court, last Term, of *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372, in which the Court ordered the Commission not to permit the Penn-Central merger to be consummated until the future of the Erie-Lackawanna, the Delaware and Hudson, and the Boston and Maine railroads was determined (see *id.* at 378 and 390).

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[1] We do not oppose the motion to incorporate, by reference, the record in No. 433, *City of Pottsville* v. *United States*, a case involving an attempt by the City of Pottsville to intervene in the proceeding below.

[2] On July 11, 1967, the court granted the applications of petitioners City of Scranton and Milton J. Shapp to intervene in the proceeding.

[3] *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I.C.C. 328.

[4] *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company—Merger etc.*, 330 I.C.C. 780, modified, 331 I.C.C. 22.

On June 9, 1967, after this Court rendered its *Baltimore & Ohio* decision, the Commission issued its decision ordering the inclusion of the three roads in the Norfolk and Western system. *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company—Merger etc.*, 330 I.C.C. 780, modified, 331 I.C.C. 22. At the same time, in the remanded *Penn-Central* proceeding, the Commission established protective conditions for the three roads until their inclusion in Norfolk and Western and again authorized consummation of the Penn-Central merger. *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I.C.C. 328. On June 20, 1967, the federal district court in New York in which the original action to set aside the Commission's merger order—the action reviewed by this Court in *Baltimore & Ohio*—had been brought was asked to enjoin implementation of the Penn-Central merger order until the validity of the inclusion order was finally determined. On July 3, 1967, it ordered all plaintiffs and intervening plaintiffs (including the present petitioners Scranton and Shapp) to file supplemental complaints by July 17, 1967; set the case down for final hearing on September 18, 1967;[5] and temporarily enjoined the merger order. Parties failing to present their challenges by that date without good cause were to be dismissed with prejudice. Petitioners Shapp and City of Scranton have declined to file supplemental complaints.

[5] This schedule was followed and the case is now under submission.

Immediately following release of the Commission's inclusion order, the Norfolk and Western filed an action in a federal district court in Virginia on June 13, 1967, to set it aside (*Norfolk and Western Railway Company* v. *United States,* No. 67–C–51–R, W.D. Va.), and the Delaware and Hudson filed a similar action on June 23, 1967, in the Southern District of New York[6] (*Delaware & Hudson R. Corp.* v. *United States,* 67 Civ. 2451, S.D.N.Y.). Subsequently, on June 26, 1967, petitioner Borough of Moosic filed the instant action, in the Middle District of Pennsylvania, challenging both the merger and inclusion orders.[7] Other interested parties indicated that they were contemplating filing additional actions in still other district courts. The United States and the Commission urged all parties to present their challenges to these orders in the one court that had familiarity with the controversy—the Southern District of New York—and, in a hearing before that court on June 28, 1967, declared that no objections to venue there would be interposed by the government against any party litigating in that forum.

To the same end, the United States and the Commission moved in the Virginia and Pennsylvania courts to stay further proceedings in those actions until the New York actions were finally determined.

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[6] The Erie-Lackawanna, Boston and Maine and various other parties have intervened in that action and the Norfolk and Western has been made an involuntary party plaintiff under F.R. Civ. P. 19(a). The case was briefed on an expedited schedule and argued on September 28, 1967, before the same three judges now considering the *Penn-Central* case.

[7] The government has not yet answered the complaint as the district court's stay order, entered July 11, 1967, was entered before the answer was due.

The Virginia court continued its proceedings until after the decision of the New York court should become available to it. The Pennsylvania court, however, issued a stay only to October 1, 1967;[8] this is the order challenged by the instant petitions. The government moved for a continuance of this stay until the New York court ruled, and on September 29, 1967, the court below scheduled a hearing for October 27, 1967, "to consider appropriate action on the status of the stay of proceedings and alternative requests of counsel."[9]

Since the district court's stay has, by its own terms, now expired, the instant petitions are moot. See *Schlagenhauf* v. *Holder,* 379 U.S. 104, 109, n. 3; *Oil Workers Unions* v. *Missouri,* 361 U.S. 363. Also, since a hearing to determine the future course of this litigation will shortly be held by the district court, a decision by this Court on whether the district court may extend the continuance would be premature.[10] In addition, we submit that the decision of the court below to stay its own proceedings while other cases challenging the same Commission orders proceed to determination is within its sound discretion (*Kansas City Southern Ry.* v. *United States,* 282 U.S. 760, 763–764; *Landis* v. *North American Co.,* 299 U.S. 248, 254–255; *Smith* v. *M'Iver,* 9 Wheat. 532, 535), and does not warrant review by

[8] A motion by petitioners to vacate the stay was denied by the district court on August 30, 1967.

[9] The district court's order is reprinted in the Appendix, *infra,* p. 7.

[10] If the New York court has not decided the *Erie-Lackawanna* and *Delaware & Hudson* cases by the time of the October 27 hearing, we expect to urge the court below to grant our pending motion to continue the stay until the New York court has ruled.

extraordinary writ in this Court. *E.g., De Beers Consol. Mines* v. *United States,* 325 U.S. 212; *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 382–383.

The petitions for extraordinary writs should be denied.

Respectfully submitted.

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Assistant Attorney General.

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WILLIAM R. WEISSMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

OCTOBER 1967.

APPENDIX

United States District Court for the Middle District of Pennsylvania

No. 10054 Civil

BOROUGH OF MOOSIC, PLAINTIFF, AND MILTON J. SHAPP AND CITY OF SCRANTON, INTERVENING PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, CITY OF PHILADELPHIA, AND ERIE-LACKAWANNA RAILROAD COMPANY, INTERVENING DEFENDANTS

Order To Be Filed No Later Than September 30, 1967, but After the Southern District of New York Acts, if It Does Act by September 30, 1967

Hearing will be held on October 27, 1967, at the United States Courthouse, Philadelphia, Pennsylvania, at 11:00 A.M., EDST, to consider appropriate action on the status of the stay of proceedings and alternative requests of counsel.

Plaintiffs are to file and serve a written statement of their requests on or before October 15, 1967, and defendants are to file and serve their requests on or before October 25, 1967.

MICHAEL H. SHERIDAN,
Judge.

Dated: September 29, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967